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MAY 22 1985
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No. 84-1521

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN HENRY HENDRICKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the evidence was insufficient to sustain his mail fraud conviction.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 1, 6, 11, and 14). He was sentenced to concurrent terms of two years' imprisonment on Counts 1, 11 and 14 and to a consecutive term of one year's imprisonment on Count 6. He was also fined $1,000 on each count. The court of appeals affirmed (Pet. App. A1-A7).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A4). In brief, it showed that petitioner and co-defendant Bobbie Faye McNeil, licensed insurance agents, sold life insurance policies to postal workers who were led to believe that they were purchasing individual retirement accounts (IRAs),

savings, or retirement programs rather than life insurance.[1] The purchasers bought the policies without reading the application and payroll deduction forms that they signed after petitioner and McNeil falsely represented themselves as postal employees or postal union representatives. The purchasers were not given any copies of the forms they had signed. Petitioner and McNeil received a commission from the insurance company for each policy sold, although the purchasers cancelled the policies after they discovered what they had purchased.

2. Petitioner contends that the evidence was insufficient to sustain his convictions on multiple counts of mail fraud. The court below properly rejected this contention.

a. Petitioner claims (Pet. 5-6) that the proof as to Count 11 was inadequate because the victim of the transaction charged in that count, Jacqueline Swanson, did not testify. The offense under 18 U.S.C. 1341 requires only that the government prove the existence of a scheme to defraud and the use of the mails for the purpose of executing the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). As the court below concluded, proof of a scheme to defraud does not require a showing that the misrepresentation actually misled anyone, so long as the probable effect was to mislead the victim. The government does not have to prove reliance by the victim or that the misrepresentations misled the victim. See *United States* v. *Ranney*, 719 F. 2d 1183, 1188 (lst Cir. 1983). Accordingly, the government need not call the person alleged to have been victimized in a particular count, if its proof is otherwise adequate to permit the jury to find fraud with respect to the count as part of a general

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[1]Petitioner led one purchaser to believe that the forms he signed were simply to discover how much money he had contributed to his Social Security account (Pet. App. A2).

scheme to defraud.[2] *United States* v. *Iaciofano*, 734 F.2d 87, 90 (1st Cir. 1984). It was therefore immaterial that Swanson did not testify. The government presented sufficient evidence on this count when her husband testified that he was present when co-defendant McNeil made the same false representations about IRAs to her that petitioner had previously made to him.

b. Nor was the evidence deficient, as petitioner claims (Pet. 6-7), because the government stipulated at trial that a reasonable person exercising ordinary care would have known, had he read the application forms, that he was purchasing insurance. It is clear that the scheme depended on the likelihood that many postal workers approached by a person representing himself to be a fellow employee or union representative would not read the applications.[3] Significantly, petitioner and his co-defendant did not give any copies of the signed forms to the purchasers. In any event, as the court below said, quoting from *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.), cert. denied, 446 U.S. 919 (1980): "If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright * * *. The only issue is whether there is a plan, scheme, or artifice intended to defraud. We discern no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity." See also *Lemon* v. *United States*, 278 F.2d 369, 379 (9th

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[2]If the rule were otherwise, frauds against persons who are deceased at the time of trial could not be prosecuted.

[3]There is no reason to assume, as petitioner does, that the purchasers were not persons of ordinary prudence. While we submit that a victim's gullibility is no defense, it would at most be an issue to be presented in a jury instruction.

Cir. 1960); *United States* v. *Sylvanus*, 192 F.2d 96, 105 (7th Cir. 1951), cert. denied, 342 U.S. 943 (1952); *United States* v. *Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980).[4]

Finally, this case does not conflict with *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), as petitioner asserts. The court there ruled that the solicitation of a purchase by means of false representations not directed to the quality, adequacy, or price of goods to be sold, or otherwise to the nature of the purchase itself, did not constitute a scheme to defraud within the prohibition of 18 U.S.C. 1341.[5] Here the misrepresentation related to the very nature of the purchase: the assertion that the postal worker was buying an IRA or a savings or retirement program, rather than insurance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[4]Petitioner incorrectly claims (Pet. 6) that *United States* v. *Louderman*, 576 F.2d 1383, 1388 (9th Cir.), cert. denied, 439 U.S. 896 (1978), requires a showing that the scheme would mislead a person of ordinary prudence. Neither that case nor *United States* v. *Mandel*, 415 F. Supp. 997, 1006 (D. Md. 1976), upon which the *Louderman* court relies, involved any claim that the schemes there involved would not have misled persons of ordinary prudence. See also *Silverman* v. *United States*, 213 F.2d 405 (5th Cir.), cert. denied, 348 U.S. 828 (1954).

[5]The salesmen there either misrepresented that they had been referred to the customer by a mutual friend or that they were trying to dispose of goods of a deceased friend of the salesman. The court emphasized that under the facts before it "the customer gets exactly what he expected." 421 F.2d at 1180.